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LEGAL THEORIES OF PROFIT¹

FOR centuries jurists and economists have studied the subject of profits, and their general analysis of the entrepreneur's income has grown constantly more complex. During the medieval period, the fair price of a commodity in England was its customary exchange value; and town guilds, common law courts, and even writers on industrial questions usually treated profit as a return for labor and effort spent in the production of economic goods. This was obviously a labor concept, but in many discussions of the time there appeared the risk theory, which conceded to the entrepreneur a return for the risk and trouble of employing capital productively. Indeed, both the labor and risk concepts of profit are to be found in the writings of the English and American economists down to this day; but in comparison with other profit theories, the former has occupied until recently the most secure position in the fields of law and economics. Stated concisely, one group of modern economists takes a conservative view of the entrepreneur function, and by a simple method represents his residual surplus as massed into a single but complex labor product, with many peculiarities.

In distinct contrast to this well-established view has arisen a more recent surplus-value theory, which explains the entrepreneur's profit as an unearned residual income above cost of production, and as largely the result of dynamic changes in industry. This important tenet has, therefore, found sufficient reason for its existence in the evolution of modern conditions; and the permanent foothold which it has secured in economic thought makes it an important element in any thorough analysis of the entrepreneur's income. To be sure, other modern doctrines of considerable importance present a variety of views which resemble more or less the labor theory, on the one side, or the

¹ By permission of the POLITICAL SCIENCE QUARTERLY this article appears simultaneously in the *Columbia Law Review* for June, 1918.

surplus concept on the other ; but it is the unusual importance and the wholly irreconcilable nature of these two main theories that have forced upon jurists and economists alike an inevitable division in economic thought, and made the subject of profits a burning question. Each theorist is partly right. But obviously the labor concept of profits cannot embrace the vast unearned surpluses of to-day arising from restraint of trade and predatory conquest. Neither is any surplus theory of profits scientifically sound which classifies as unearned the differential returns from reduced costs of production. Surely more efficient technical processes or better inventions yield a definite measure of earned income.

Clear it is, then, that no one view of profits is wholly correct ; and the legal theories of this residual surplus, which are already established in our common law, are, therefore, presented here as one step in the task of distinguishing fundamental concepts of the entrepreneur's various increments. The income known in law as profits resembles much a stream with many tributaries. It may include concrete things ; as, payments in kind, services, soil, and objects beneath the surface of the earth, on the one hand, and such wholly unreliable returns as may fall to the hand of the gambler on the other. And whether the entrepreneur devotes his activities to the field of agriculture, commerce or manufacturing—or to any of their allied pursuits—this income appears to flow constantly from numerous sources which depend more or less on the adjustment of natural and social forces. In fact, it may be said that the many accretions from the operation of industrial forces really make up gross profits, but courts of law seldom tarry over the gross income ; the terms “rents” and “profits” are usually interpreted as meaning “net profits.” A much-quoted opinion defines profits as the excess of receipts over the expenditures necessary to earn them ; but the apparent simplicity of this legal formula is soon lost sight of in the solution of practical problems. In striking this balance between the total income and the outgo, divers methods of arriving at the final result have given us several concepts of profits ; and in studying the general plan of profit analysis, as a whole, the economist is impressed by the increas-

ing tendency on the part of American courts to obliterate the well-known distinctions which writers on economic theory have maintained for a century between profits, rent, and interest.

I

American judges have not taken kindly to the labor concept of profits, which represents this income as primarily one form of the wages of labor. This fact may be due in a measure to their failure to read the early common-law cases, and to their superficial examination of the works of the classical economists. That is to say, inexact definitions, drawn from these writers on the subject of profits, have been carried in legal opinions for generations, working unique effects in the distribution of wealth.

The more common of these interpretations conveys the terse statement that profit denotes the difference between the value of the advances and the returns resulting from their employment. By the term "advances" the courts doubtless have in mind here simply the outgo of the entrepreneur as expenses of production. And the amount represented by the phrase "returns resulting from their employment," may be assumed as equivalent to the gross income of the entrepreneur. This definition was probably taken from the early discussion of profits by Thomas Malthus; and if we stop to consider the slow progress made previous to this time in economic theory, it was not an unhappy expression of this theory of profits. But in constructing a more scientific definition of profit, courts have used the writings of these early economists authoritatively to eliminate the wages of superintendence from the entrepreneur's profits. Thus the supreme court of California includes, among other definitions of profit, a common interpretation from the works of Adam Smith¹ and J. S. Mill.² The definition of the court runs thus:

In distinction from the wages of labor, it is well understood to imply the net return to the capital or stock employed, after deducting all the expenses, including not only the wages of those employed by the

¹ *Wealth of Nations*, bk. i, ch. 6.

² *Political Economy*, ch. 15.

capitalist, but the wages of the capitalist himself for superintending the employment of his capital stock.¹

This is an erroneous interpretation of J. S. Mill's definition; it has been accepted by the courts without troubling themselves to refer to the exact words of that learned economist, whose statement is, in fact, quite the contrary.

The line drawn between wages and profits in this interpretation may be taken as a modern, though not undisputed, theory in legal history. Yet it was used as early as 1828 in separating the various issues and incomes from land. The income of an estate meant nothing more to a court in Maine than the profits that it would yield after deducting the charges of *management*. The rent which could thus be obtained from this estate was its income; for, said the court, "The rents and profits of an estate, the income, or the net income of it, are all equivalent expressions."² This hostility toward a labor theory of profits is more clearly expressed in Illinois. In 1878 its supreme court was of the opinion that compensation for the labor of the officers of a corporation could not be regarded as profit within the meaning of the law. Profit in its ordinary sense was construed to mean the gain from any business or investment—"a different thing altogether from mere compensation for labor."³ Highly significant is the fact that this modern tendency to discard the ancient labor concept of profits, is following gradually a process of elimination in which the final surplus, or remaining profit going to the entrepreneur, will finally be largely an unearned increment. That is, except for the worry and risk taken in connection with a business, there will be no human sacrifice recognized in law to which it may be attributed by either judge or jury.

Yet it seems that academic authority is not entirely responsible for this result. Bouvier's *Law Dictionary* states:

Profits are divided by writers on political economy into gross and net,

¹ *People v. Savings Union* (1887) 72 Cal. 199, pp. 202-203, 13 Pac. 498.

² *Andrews v. Boyd* (1828) 5 Me. 199, p. 203; see also *Earle v. Rowe* (1853) 35 Me. 414, p. 420.

³ *Commercial League etc. v. People* (1878) 90 Ill. 166, at p. 173.

—gross profits being the whole difference between the value of advances and the value of returns made by their employment, and net profits being so much of that difference as is attributable solely to the capital employed. The remainder of the difference, or in other words, the gross profits minus the net profits, has no particular name, but it represents the profits attributable to industry, skill and enterprise. See Malthus, *Political Econ.* : M'Culloch, *Political Econ.* 563.¹

It will be noted that the "remainder of the difference" which has no particular name, but is imputed here to some form of activity, skill or enterprise on the part of the entrepreneur, is really a modern interpretation of the labor concept of profit. Yet the author does not explain this profit as a particular form of labor wage. The truth is that this interpretation was originally taken from two early works on economics, and it illustrates well the persistent hold which previously accepted theories often retain in modern law. To be more explicit, it is said on the same page, in reference to the teaching of Adam Smith and J. S. Mill, that profits imply the net return to the "capital of stock" employed after deducting all the expenses, including the wages of the capitalist himself; and, to quote the author's exact words, "After indemnifying the capitalist for his outlay, there commonly remains a surplus, which is his profit, the net income from his capital. 1 Mill. *Polit. Econ.* c. 15." Now if the author of these excerpts had read carefully chapter 15, book ii of J. S. Mill's work on *Political Economy*, he would have found that the nameless surplus which he has thus separated from the return to capital is called "wages of management"—a fact which the courts have several times denied. These excerpts but emphasize one of the many anomalies of the law that arise through inexact quotations from previous authorities both legal and economic.

Again it is necessary at this point to draw attention to another exception to this rule of the law; for the foregoing opinions against the labor concept of profits do not occupy undisputed possession of the field. In rendering damages for injury to property, courts of law include wages of management as a part

¹ Bouvier, *Law Dictionary* (Rawle's 3rd rev.) 2737.

of the profits of an enterprise. The rule of compensation for damages was probably first applied in very early cases to the earnings of the laborer and the strictly professional man. That is, we find that the value of their services was often estimated as profits. And there is now a well-established rule of law which allows the entrepreneur to recover compensation for any injury to his income from the wages of superintendence and management. In fact, in estimating the amount of damages due to loss of profits, personal earnings rather than the income from capital are usually preferred in establishing the legal rule of compensation. In this relation the decisions of several states have been quite uniformly against the recognition of profits on capital. This tendency is, of course, of great significance; for the courts have given us a remarkable series of legal data which serve to distinguish the personal earnings of the entrepreneur, and consequently to give them a secure legal position in law as profits. This same attitude, however, is sometimes taken by judges in cases arising outside of the field of damages. One example will probably make this point plain. In deciding upon the right of a state to levy a tax upon the profits of a merchant's stock in trade, the supreme court of Massachusetts in 1870 distinguished between the income from a profession, trade or employment, which was already taxable, and that arising from capital invested as stock in a business. The court declared:

The income meant by the statute is the income for the year, and is the result of the year's business. It is the net result of many combined influences: the use of capital invested; the personal labor and services of the members of the firm; the skill and ability with which they lay in, or from time to time renew, their stock; the carefulness and good judgment with which they sell and give credit, and the foresight and address with which they hold themselves prepared for the fluctuations and contingencies affecting the general commerce and business of the country. To express it in a more summary and comprehensive form, it is the creation of capital, industry and skill.¹

It seems clear at this point that the modern concept of

¹ *Wilcox v. County Commissioners* (1870) 103 Mass. 544, at p. 546.

profits, as a return from the personal labor of the entrepreneur, will always be used by the courts in determining the rule of compensation in injury to property. And it is equally plain that the obvious departure from the labor concept of profit, which we have previously noted, was due largely to a hasty misconstruction of J. S. Mill's definition of profit. There is, in fact, no ground in Mill's work for the statement that wages of management are excluded from profits.

But the opinions against the labor concept of profits are also in conflict with many ancient and modern decisions on this point. In 1882 a court of Ontario held strictly to the labor concept embodied in a previously accepted definition of the word "profits": "In a wider sense it means, according to the Imperial Dictionary," explained Chief Justice Spragge, "'any advantage, any accession of good from labor or exertion.'"¹ Somewhat later it was pointed out in the opinion of a court of Pennsylvania that profits derived from the management of a business enterprise were not equivalent to total earnings. To be sure, the word "earnings" was interpreted narrowly according to the definition cited from Anderson's Law Dictionary² as "the fruit or reward of labor, the price of services performed."³ In the conclusion, however, profit seems here to have been made equal to the total net gain of an enterprise, but depending largely upon other circumstances than the earning capacity of the manager. The opposite idea is, however, put more tersely by this same court in another decision. It is said, indeed, that in many instances profits derived from the management of a business may properly measure its earning power. Especially is this true, emphasized the court, if the enterprise receive the personal attention and labor of the owner.⁴

Turning to other examples, the medieval labor concept of profit is also retained in various cases in which the right to commissions on property sold by an agent is adjudicated. In

¹ *Workman v. Robb*, Ont. App. Rep. 399, 400, 404.

² At p. 390.

³ *Goodhart v. Pennsylvania R. R.* (1896) 177 Pa. 1, at p. 15, 35 Atl. 191.

⁴ *Wallace v. Pennsylvania R. R.* (1900) 195 Pa. 127, at p. 130, 45 Atl. 685.

English law, commissions, which would accrue to public agents for the sale of merchandise, were regarded as profits, and could be insured as such.¹ In two instances the right of a person to participate in the commissions of a business, was held to make him a partner.² In the United States a commission charged for the sale of western land was construed by the supreme court of Washington to be profits and a part of the net returns.³ In like manner, where the sale of a copyrighted map was an infringement upon the rights of the owner, the commissions derived from the improper act were distinguished as a part of the profits and turned over to the plaintiff in the case.⁴

There are, of course, many conflicting decisions on this point, yet in the face of other profit theories, the labor concept is gradually losing its place in the legal field; for the returns upon all higher forms of mental and physical labor are being gradually merged into wages. But the net profit surplus, above wages of management, at which jurists are gradually arriving by this process of elimination—the excess of value returns over advances—remains to them still a complex subject.

II

The rent concept of profit as simply a return from land holds a very substantial position in English and American law; it has, in fact, come down to us from medieval times. In its original meaning, rent was defined as a sum of money, or other consideration, issuing yearly out of lands or tenements; or again, it was said to be a part of the profits of such property, paid not necessarily in money, product or labor—which were frequently rendered for rent—but in anything which could be regarded as a fixed amount or be reduced to a certainty.⁵ Con-

¹ *Lucena v. Crauford* (1802) 3 Bos. & Pul. 75, reversed on its facts in the House of Lords. (1806) 2 Bos. & Pul. N. R. 269.

² *Waugh v. Carver* (1793) 2 H. Bl. 235; *Cheap v. Cramond* (1821) 4 B. & Ald. 663; *Young v. Axtell* (1784) cited in *Waugh v. Carver*, *supra*, at p. 242.

³ *Cooke v. Cain* (1904) 35 Wash. 353, at p. 359. 77 Pac. 682.

⁴ *Stevens v. Gladding* (C. C. 1856) 23 Fed. Cas. No. 13, 399.

⁵ Co. Lit. 47a, 142, 142a; *Smith v. Colson* (N. Y. 1813) 10 Johns. 91; *Gilbert, Rents* 87; *Browning v. Beston* (1556) 1 Plow. 131, at pp. 132, 138, 141; 2 Bl. Comm. *42, *43; *Minor Inst.* 32-43.

sequently, the fact that rent was fixed and issued only out of land served to distinguish it from other forms of profit obtained either from the land or from the chattels on it. Thus Lord Coke states that if a house and land "with a stock or sum of money rendering rent" be demised for a term of years, "the assignee shall not be charged with this covenant: for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum but out of the land only."¹ This "stock or sum," as used in his excerpt, is an independent factor, and does not, therefore, include the buildings on the land, for these are tenements and virtually a part of it. Rent issues, of course, from the tenements, and to this extent it may be conceded that legally it arises from the use of capital. But rent could not be reserved out of any chattel, office, fair, market, common, franchise, privilege, tithe or advowson.² Indeed, from the numerous cases involving the payment of rent, it is clear that it was only by the most careful discrimination that early English judges were able to keep the rent profit entirely distinct from the income of stock or chattels.

The question whether rent may ever originate in the use of the stock obtained by the tenant with leased premises is, of course, not new to American jurists; and a most difficult issue has arisen over the doctrine of apportionment, namely, whether there should ever be a deduction of the rent in case the tenant suffers a loss on his leased stock. To allow an apportionment of the rent according to this loss would obviously extend the rent concept to chattels and, therefore, in effect, break the ancient rule. An English authority³ cites a specific instance in which all of the sheep on certain leased premises had died. He is inclined to think that under such circumstances the rent would not be apportioned; for although it was naturally increased by the profits which arose from the sheep, "it may be doubted, whether the Rent shall be abated, while The tenant

¹ *Spencer's Case* (1583) 5 Coke 16a, at p. 17a; See *Commonwealth v. Contner* (1852) 18 Pa. 439; *Fay v. Holloran* (N. Y. 1861) 35 Barb. 295, at p. 297; *Minor Inst.* 34.

² *Co. Lit.* 47a, 142a, 144a; 2 *Rol. Abr.* 446.

³ *Gilbert, Rents, 187-188*, citing *Richards le Taverner's Case* (1544) 1 *Dyer* *56.

enjoys all the Land out of which the Rent issues." This opinion was known to the supreme court of Virginia which departed from the established principle in 1808. Action for rent was brought against one who was entitled by a lease to the services of both a mill and the miller. But the latter having been given his freedom according to law declined to continue in the service of the lessee. Although the court acknowledged that it had found no case expressly in favor of the opinion which it entertained, yet it was of the belief that the jury could have apportioned the loss which the tenant had sustained by the departure of the miller.¹ However, in a later case it would seem that the court purposely evaded giving an opinion on this exact point.² Also, in Pennsylvania the change in the established doctrine of apportionment came suddenly. In 1852 we find the supreme court of that state declaring, according to the accepted theory, that "a sum of money, payable periodically for the use of chattels, is not RENT in any legal sense of the word."³ But four years later the ancient principle was repudiated. In the opinion of the court:

The ordinary definition of rent, as a profit issuing yearly out of lands and tenements corporeal is defective in overlooking some of the cases that belong to the class; as where a furnished house or a stocked farm is leased, which are common cases: 5 *Bos. & P.* 224; 5 *Co.* 16b; 1 *Leon.* 42. In such cases the personal property is really a part of the consideration of the rent, and it is only by fictitious accommodation of the case to the defective definition, that it can be said that the rent issues exclusively out of the land. It is better to correct the definition.⁴

By persisting in this view, the courts of Pennsylvania have affixed the rent concept more or less permanently to capital; but it need hardly be repeated that this theory is an exception to the general rule now prevailing in the United States.

¹ *Newton v. Wilson* (1809) 13 Va. 470.

² *Scott v. Scott* (1868) 59 Va. 158.

³ *Commonwealth v. Contner*, *supra*, footnote 1, p. 192, at p. 447.

⁴ *Mickle v. Miles* (1856) 31 Pa. 20, at p. 21; see also *Vetter's Appeal* (1881) 99 Pa. 52, at p. 55.

At the present time the rent concept of profit may still be distinguished from other ideas of profit by the frequent declaration that rent is a fixed yearly return issuing only out of the land.¹ And by an ancient *dictum*, it is not to be considered a part of the land or thing out of which it issues.² In contrast to rent, other profits are said to be the residual surplus from various sources fluctuating and uncertain in character, and depending on skill, care and the nature of the business transaction.³ Yet a dangerous tendency to fuse the incomes of land is not entirely absent. In referring to previous quotations, which it had gathered from various decisions, the supreme court of New York in 1903 declared: "There is no such technical or peculiar meaning to the phrase 'rents and profits' as to deny a synonym in 'profits and gains.' A rent is a profit, and the profit in rents and profits is a profit still."⁴ Stated concisely, the situation is simply this: the courts of one state are striving to differentiate the concepts of profit, while the judges of another state are consciously synthesizing the same ideas. But in general one is fully impressed by the important fact that although the legal theory of rent is obviously a productivity concept, it is, nevertheless, still confined to land and its tenements.

¹ *Fay v. Halloran*, *supra*, footnote i, p. 192, at p. 297; *Stephens v. Reynolds*, (1852) 6 N. Y. 454, at p. 458; *Dolph v. White* (1855) 12 N. Y. 296, at p. 300; *Sutliff v. Atwood* (1864) 15 Ohio St. 186, at pp. 192-193; *Jones v. Smith* (1846) 14 Ohio 606, at p. 608; *Van Wicklen v. Paulson* (N. Y. 1853) 14 Barb. 654; *Bloodworth v. Stephens* (1875) 51 Miss. 475, at p. 480; *Boyd v. McCombs* (1846) 4 Pa. 146; *Ivy v. Gilbert* (1722) 2 P. Wms. *13; *Attorney General v. Foundling Hospital* (1793) 2 Ves. Jr. 42, at p. 48; *Armstrong v. Cummings* (N. Y. 1880) 58 How. Pr. 331.

² *Browning v. Beston*, *supra*, footnote 2, p. 192, at p. *132.

³ *Bennett v. Austin* (1880) 81 N. Y. 308, at p. 319; *Last v. London Assurance Corp.* (1885) 10 App. Cas. 438, at p. 450; *Mersey Docks v. Lucas* (1883) 8 App. Cas. 891, at p. 905; *Freeman v. Freeman* (1886) 142 Mass. 98, at pp. 99-100, 7 N. E. 710; *Rogers-Ruger Co. v. McCord* (1902) 115 Wis. 261, at p. 265, 91 N. W. 657; *Jones v. Davidson* (1854) 34 Tenn. 447, at p. 452; *Owston v. Ogle* (1811) 13 East 538; *Hitchcock v. Tremaine* (1872) 12 Fed. Cas. No. 6, 540.

⁴ *Thorn v. De Breteuil* (1903) 86 App. Div. 405, at p. 416, 83 N. Y. Supp. 849.

III

The capital concept of profit is used here in a broad sense to include the growth or increase of capital itself by accretions of product or earnings. As all products are capital to the economist, while they are still devoted to production, and as all earnings are capital to the business man, until they are declared to be dividends, this concept of profit represents simply the additions to capital created through productive effort. Courts seldom go to the trouble of separating the exact annual output of capital from the previous total concrete mass used in production; distinctions of this sort are usually beyond their sphere. Moreover, judges also recognize that the earnings of a business are often turned back into the original fund of capital, which goes on its ceaseless round, its constant transformations, and its definite wealth-producing cycle.

This concept of profits crops out at unexpected angles from either the simple natural economy of the farm or the more active fields of finance in the commercial world. By way of illustration, the lessee of certain premises in Ontario erected thereon suitable buildings for use in his own trade, which were intended to go ultimately to his landlord in payment of rent. Obviously, both in a legal and an economic sense, these structures were capital. Although the court hesitated to call them rent, it did nevertheless rule that they were profits which were finally to become possessions of the landlord. In this sense, therefore, profits took the form of concrete products which were already devoted to further production. Indeed, in the opinion of Mr. Justice Spragge there was no necessity for restricting the word "profits" to a periodical return from the land, though that was conceded to be its common meaning. The decision states that "In a wider sense it means, according to the Imperial Dictionary, 'any advantage, any accession of good from labor or exertion.' In that sense Robb received a profit every time that a building or addition to a building was placed upon his land."¹ In this, as well as in other opinions, judges have simply reverted to the medieval method of meas-

¹ Workman v. Robb, *supra*, footnote 1, p. 190, at pp. 400, 404.

uring profit in terms of product or payment in kind. In a case in Connecticut the phrase "profits from the farm" was construed to comprise, not only net profits, but all of the products raised by the tenant.¹ A similar example may be found in the state of Washington. In 1897 the supreme court was of the opinion that "while in a strictly etymological sense, it might be that neither the words 'rents, issues, or profits' would embrace the increase of cattle, yet to give this narrow and restricted construction to the statute would lead to results inconsistent with the evident intention of the legislature, which passed the community property law."² Profits were therefore taken to include the increase of cattle.

Turning to the realm of higher finance, we find that even there capital may also include profits. For example, in New Jersey profits do not necessarily imply money to be divided. In the words of the court, "they may be represented by the unsold portion of the property which was the subject of the speculation."³ But the broadest construction given to the capital concept has probably occurred in Iowa. There the court declared:

Some difference is expressed as to what are profits, and how they are to be arrived at. This is fully answered in *Miller v. Bradish*, 69 Iowa, 278, where it is said: "The assets, resources and funds of the corporation must consist of cash on hand and other property, and, if such assets exceed the liabilities, a dividend can be lawfully declared;" in other words, a profit exists.⁴

It would seem from this decision that if the assets of a business exceed the liabilities by one dollar, then the capital or profits would also equal one dollar—that is, capital and profits would be identical.

That a considerable part of profits, at least, consists of earnings upon capital is a widely accepted theory in American law;

¹ *Richmond v. Connell* (1887) 55 Conn. 403, 11 Atl. 853.

² *Harris v. Van De Vanter* (1897) 17 Wash. 489, at p. 492, 50 Pac. 50.

³ *Jones v. Davis* (1891) 48 N. J. Eq. 493, at p. 499, 21 Atl. 1035.

⁴ *Hubbard v. Weare* (1890) 79 Iowa 678, at pp. 688-689, 44 N. W. 915.

it has sifted into our legal decisions from the opinions of English economists and statesmen. Still it is to be noted that such profits are not considered to be the equivalent of interest, but constitute rather the excess income above the expenditures necessary to earn it.¹ Thus in 1883, Lord Selborne construed the profits of a business to be "all the net proceeds of the concern after deducting the necessary outgoings without which those proceeds could not be earned or received."² In a similar case two years later, Lord Fitz Gerald adopted a more elaborate interpretation of profits by declaring that the expression means "the incomings of the concern after deducting the expenses of earning them," or "income of whatever character it may be over and above the costs and expenses of receipt and collection."³ Also, in discussing the general field of profits, jurists have recently shown a marked tendency to avoid primary concepts. This means, of course, in particular states that the entrepreneur's residual incomes are fused into a single profit—the net return above expenses. Thus "divisible profits" are frequently spoken of as the net return which a company, after making all reasonable and adequate provision for its own safety, may properly divide among its stockholders.⁴

It may be frankly acknowledged that in striking contrast to their neglect of the labor theory of profits, American jurists have given great weight to the earning power of capital; so

¹ Bouvier, *loc. cit.*

² *Mersey Docks v. Lucas*, *supra*, footnote 3, p. 194, at p. 903.

³ *Last v. London Assurance Corp.*, *supra*, footnote 3, p. 194, at p. 450; see also *Dean v. Dean* (1882) 54 Wis. 23, at p. 33-34; *Burt v. Rattle* (1877) 31 Ohio St. 116, at p. 130; *City of Allegheny v. Pittsburg etc. R. R.* (1897) 179 Pa. 414, at p. 421, 36 Atl. 320.

⁴ *Bain v. Aetna Life Insurance Co.* (1891) 21 Ont. Rep. 233, at p. 241; see *Bond v. Pittard* (1838) 3 M. & W. *358, at p. *360; *People v. Savings Union* *supra* footnote 1, p. 187, at p. 203; *Braun's Appeal* (1884) 105 Pa. 414, at p. 417; *Jones v. Davidson* (1854) 34 Tenn. 447, at p. 452; *St. John v. Erie Ry.* (1872) 21 Fed. Cas. No. 12, 226; *Connolly v. Davidson* (1870) 15 Minn. 519, at p. 530; *Eyster v. Centennial Board of Finance* (1875) 94 U. S. 500; *City of Allegheny v. Pittsburg etc. R. R.*, *supra*, footnote 3. The commodity concept of profit really deserves to be treated separately. *Portland Bank v. Apthorp* (1815) 12 Mass. 259, p. 263; *Hamilton Co. v. Massachusetts* (1867) 73 U. S. 632, at p. 640.

much so, indeed, that in many instances—as in the case of manufactured goods—capital profit has been made to absorb the speculative gains of the market. Moreover, little need has existed, except in particular instances, of separating this form of profit from the unearned surplus. In the fields of trade and commerce, however, the direct connection between capital and income is less distinct, the “productivity” of capital is not so apparent, its earning power loses somewhat its usual emphasis, and it is then but a step to the idea that profits are simply the excess of receipts over expenditures. That is to say, American courts, as a whole, are slowly evolving by a process of elimination a pure *value concept* of profit.¹ In fact, though they do not distinguish profit as an unearned increment, they allow, nevertheless, in the solution of practical questions, a surplus value profit that is not a return on labor, capital or land.

IV

In both ancient and modern law land is sometimes designated as capital; and the previous capital concept of profit income, as it has been described, is, therefore, quite similar to the following theory that *land* itself constitutes profits. In a broad sense, objects upon the earth's surface, or anything beneath it, embody in a more or less fixed form such returns to the owner. The right to take timber, ice, stone, minerals or sea weed from a tract of land is equivalent to an interest in the soil and therefore in its profits.² Of like nature is the right to use land simply for the purpose of pasturing, fishing or hunting.³ Where the owner of a farm had allowed another to occupy it without the payment of rent, the single fact that the former had continued to pasture his cattle on the land, and to gather in a legal sense profits with the grass, prevented the

¹ The value concept of profit represents this return as a surplus above the cost of production.

² Kennedy Stave etc. Co. v. Sloss-Sheffield etc. Co. (1902) 137 Ala. 401, 34 So. 372; Payne v. Sheets (1903) 75 Vt. 335, 55 Atl. 656; Hill v. Lord (1861) 48 Me. 83, at p. 100; Huff v. McCauley (1866) 53 Pa. 206.

³ Tinicum Fishing Co. v. Carter (1869) 461 Pa. 21, at p. 37; Albright v. Sussex County etc. Comm. (1904) 74 N. J. L. 303, at p. 305, 59 Atl. 146; Payne v. Sheets, *supra*, footnote 2.

tenant from getting exclusive possession against him.¹ Also, the tenant for life is usually entitled to enjoy all the profits of the land during his estate therein. Things to be consumed become his immediate profits; other objects also may be put to the use for which they are especially designed. Possessions which he may use or consume include, of course, all timber, minerals, oil, gas and water on the land; and when his acts are not limited by expressed restrictions, he may in supplying his own needs work the land to the final stage of exhaustion.² But in his enjoyment of such concrete profits he is not permitted to damage or waste the estate.³ Likewise, in other instances, one person may secure a right by grant, inheritance or prescription in the land of another; and his returns therefrom are termed *profits à prendre*.⁴

Where a will has clearly provided for the settlement of debts out of the profits of an estate, the property itself is often sold to meet the requirements of the law.⁵ Thus in 1739 an English court explained that the natural meaning of "raising a portion by rents, issues, and profits is by the yearly profits"; but that the word "profits" has, in some particular instances, been extended to include any profits which the land will yield, either by sale or mortgage.⁶ But a certain learned judge has

¹ Rennie v. Frame (1896) 29 Ont. Rep. 586, at p. 590.

² Rankin's Appeal (Pa. 1888) 16 Atl. 82, at p. 87; Koen v. Bartlett (1895) 41 W. Va. 559, at p. 567, 23 S. E. 664; Williard v. Williard (1867) 56 Pa. 119, at p. 129; Shoemaker's Appeal (1884) 106 Pa. 392; Westmoreland Coal Co.'s Appeal (1877) 85 Pa. 334; Kier v. Peterson (1861) 41 Pa. 357, at p. 361; Neel v. Neel (1852) 19 Pa. 323, at pp. 327-328; Holman's Appeal (1854) 24 Pa. 174, at p. 178; Wentz' Appeal (1884) 106 Pa. 301, at p. 307; McClintock v. Dana (1884) 106 Pa. 386, at p. 391.

³ Smith v. City Council of Rome (1855) 19 Ga. 89, at p. 92; Dickinson v. Jones (1867) 36 Ga. 97, at p. 104; Co. Lit. 54b.

⁴ Payne v. Sheets, *supra*, footnote 2, p. 198, at p. 344; Kennedy Stave etc. Co. v. Sloss Sheffield etc. Co., *supra*, footnote 2, p. 198; Albright v. Sussex County etc. Comm., *supra*, footnote 3, p. 198; Wickham v. Hawker (1840) 7 M. & W. 62, at p. 79; Ewart v. Graham (1859) 7 H. L. C. *331; Post v. Pearsall (N. Y. 1839) 22 Wend. 425, at p. 441; Cobb v. Davenport (1869) 32 N. J. L. 369, at p. 384; Bingham v. Salene (1883) 15 Ore. 208, 14 Pac. 523.

⁵ *Ex parte Artis* (1752) 2 Ves. 490; Anonymous (1682) 1 Vern. 104; Lingon v. Foley (1675) 2 Ch. Cas. 205.

⁶ Ivy v. Gilbert, *supra*, footnote 1, p. 194, at p. 19; Trafford v. Ashton (1718) 1

stated that there is not one case in ten in which the court has decreed a sale on the words "rents and profits" that it was in harmony with the testator's intentions. Yet to aid a creditor, as he has explained, a sale has often been ordered on the ground that "rents and profits" in a will mean to pass the land.¹ The general rule in England seems to be that the natural meaning of the word "profits" in this connection is "annual profits," but it should be noted that where the court is not expressly confined to this interpretation, it is construed in its broadest sense to constitute the land itself.²

V

Although American courts do not definitely emphasize the *value concept* of profit as a surplus above the costs of production, it seems, nevertheless, that in the case of speculative ventures and monopolized industries, this view has found its proper niche in the general plan of legal profits. Indeed, a pure value surplus in speculative enterprises has been accepted as legitimate profit in English law since the middle of the seventeenth century; and the clear-cut opinions of these early decisions have been followed in a greater or less degree in our own states. In some respects our state decisions go even farther than the English law; and as economists we are interested here especially in two sets of cases. In the first group, the value surplus is uniformly considered to be profits; in the second, it is un-

P. Wms. 415, at p. 418; see *Evelyn v. Evelyn* (1731) 2. P. Wms. 659, at p. 666; *Mits v. Banks* (1724) 3 P. Wms. 1, at p. 8; *Okeden v. Okeden* (1738) 1 Atk. 550; *Small v. Wing* (1762) 3 Bro. P. C. 503; *Gibson v. Rogers* (1750) 1 Amb. 93, at p. 95.

¹ *Baines v. Dixon* (1747) 1 Ves. 41, at p. 42; see also *Green v. Belchier* (1737) 1 Atk. 505, at p. 506; *Reed v. Reed* (1812) 9 Mass. 372; *Goldin v. Lakeman* (1831) 2 B. & Ald. 30, at p. 42; *Fox v. Phelps* (N. Y. 1837) 17 Wend. 393; *Earle v. Rowe*, *supra*, footnote 2, p. 187.

² Whether or not the land is sold depends upon the general terms of the will, the time allowed for raising the necessary funds, the situation of the estate, the nature of the debt and the age of the beneficiaries. *Barnardiston v. Carter* (1717) 3 Bro. P. C. 64; *Heneage v. Lord Andover* (1829) 3 Y. & J. 360; *Gore v. Gore* (1722) 2 P. Wms. 28, at p. 63; *Albemarle v. Roger* (1794) 2 Ves. Jr. 477, at p. 483; *Earl of Pomfret v. Lord Windsor* (1752) 2 Ves. *472, at p. 480. *Ivy v. Gilbert*, *supra*, footnote 1, p. 194.

hesitatingly declared to be capital. In this second instance, the courts are apparently undertaking the important task of separating the pure value increment from what appears to them to be the actual or concrete income of an estate.

This concept of profit is, in the first place, readily found in cases which relate to speculation in real estate. As early as 1859 a court in Ontario recognized that the scarcity surplus from a speculative enterprise is a substantial profit. The profits here were to be divided equally between two partners, one of whom furnished the capital while the other selected and purchased desirable tracts of land. It was not clear to the court whether there were actual profits from the sale of the land, or only estimated returns based on its valuation. It was nevertheless held that the profit to be divided equally between "the parties was the value, whether ascertained upon resale or by valuation, after deducting the cost and incidental expenses."¹ In a later case in Missouri, which involved two firms engaged in the real-estate business, each party to the contract in question was entitled to one-half of the "acquisitions beyond expenditures." Citing Webster's Dictionary as authority, the court decided that this expression was a definition of profits, and that in the contract it represented the land as well as the money obtained by the firms from their various deals.² Again, in referring to an investment in wild or unproductive land, the court of Pennsylvania in 1890 expressed the opinion that if the sum for which the speculator sells it "does not exceed the purchase money and interest thereon, he does not realize a profit on the investment."³ That is, while the courts of this state seldom include interest in profits, they frequently recognize the speculative increment as such.

In other decisions this idea of profit is not so readily accepted. Thus in the early cases of this same state, which determined the right of the life tenant to the profits of an estate held in trust for the beneficiaries of a will, the pure value sur-

¹ *Proudfoot v. Bush* (Upper Can. 1859) 7 Grant 518, at pp. 522-533.

² *Carter v. Arnold* (1896) 134 Mo. 195, at p. 208, 35 S. W. 584.

³ *Hentz v. Pennsylvania Co.* (1890) 134 Pa. 343, at p. 347, 19 Atl. 685.

plus of property was considered to be profits;¹ but in a recent case the ground has been taken that such increased value is capital and passes with the estate.² In deciding the same issue, the courts of New York also follow the principle that the right of a life tenant to the profits of an estate does not include the surplus arising simply from an increase in its value.³ But in many decisions the subject matter is so complex that there seems to be no settled definition of profit, and the value increment is often designated as either capital or profits. Thus in 1895 it is conceded by one court of this state that both the speculative increment and interest may sometimes be included in profit. "And while the interest or income as well as increased value of the securities," runs the opinion, "may be treated as profit, that term in common parlance is the pecuniary advantage resulting from dealing or trafficking in property."⁴ Almost ten years later a much better definition is included in the opinion of another court of this state. After repeating the prevailing formula that "profit" ordinarily means the excess of returns over expenditures, it "may or may not, according to circumstances," declared the court, "include in the returns any increase in value of the capital, and in the expenditures any depreciation of capital." Lastly, in a more scientific sense, it is said to be the excess which remains after deducting from the returns, not only "the operating expenses and depreciation of capital, but also interest on the capital employed."⁵ The opinions of these last two states represent the most advanced analysis of profits. At least most courts seem to follow no one established rule in determining the entrepreneur's income.

The value concept is also intrenched securely in a large group of decisions involving the collection of profits which have been

¹ *Earp's Appeal* (1857) 28 Pa. 368, at p. 374; *Smith's Estate* (1891) 140 Pa. 344, at p. 352; 21 Atl. 438.

² *Hubley's Estate* (Pa. 1884) 16 Phila. 327, at p. 330; *Graham's Estate* (1901) 198 Pa. 216, at pp. 220-221, 47 Atl. 1108; *Kemble's Estate* (1902) 201 Pa. 523, at p. 525; 51 Atl. 310.

³ *Matter of Proctor* (1895) 85 Hun. 572, 33 N. Y. Supp. 196.

⁴ *Ibid.*, at p. 573.

⁵ *Mayer v. Nethersole* (1902) 71 App. Div. 383, at p. 388, 75 N. Y. Supp. 987.

lost by the nonperformance of a contract. If one party in purchasing commodities or services fails to keep his agreement, the second may suffer two important losses which consist of (a) the expenditures made before the contract was broken, and (b) the prospective profits. It will be noticed that the second item comprises solely future profits—that is, a surplus value over expenses, which may be collected as damages, though it may be entirely unearned. If the claimant cannot furnish direct proof of his ability to secure such prospective returns during the performance of his agreement, or if they are highly speculative in character, they will not be allowed as damages. By this ruling highly speculative gains are eliminated from such contingent profits. But in some instances profits are so certain that they become part and parcel of the contract itself. For example, if one person has agreed to furnish certain goods to another on a particular day at a definite price, but fails to perform his part of the contract, the second person may usually collect the difference between the stipulated price and the market value of the commodities at the time they should have been delivered. It is obvious that the second person has never really earned this profit, but the speculative income becomes none the less a legitimate return.¹ In like manner, if one person has contracted for definite services, or for the delivery of certain goods at a specified time, and refuses subsequently to keep his agreement, he is usually liable in damages for the difference between the expenses incurred by the plaintiff and what the latter would have received had he been permitted to complete his contract. The Supreme Court of the United States follows a definite rule in estimating the profits to which the plaintiff is entitled in such cases. Damages shall consist of “the difference between the cost of doing the work and what claimants were to receive for it, making reasonable deduction for the less time engaged, and for release from the care, trouble,

¹ *Grainsford v. Carroll* (1824) 2 Barn. & Cress. 624; *Clark v. Pinney* (N. Y. 1827) 7 Cowen 681; *Quarles v. George* (1839) 40 Mass. 400; *Shepherd v. Hampton* (1818) 16 U. S. 200, at p. 204; *Dey v. Dox* (N. Y. 1832) 9 Wend. 129, at p. 134; *Shaw v. Nudd* (1828) 25 Mass. 9, at pp. 13-14; *Leigh v. Patterson* (1818) 8 Taunt. 540.

risk, and responsibility attending a full execution of the contract."¹ To be more explicit, the entrepreneur usually makes two forms of expenditures, namely money and personal sacrifice. But as he does not undergo this personal sacrifice in this particular instance in performing his part of the contract, he is only entitled to compensation for his actual losses and to the surplus value which he would have acquired had he been allowed to complete his agreement. Profits of this sort have been collected from the United States because of its failure to carry out its contract in securing supplies for the army; but in repairing the harbor at New Orleans, although the government again failed in its agreement, the entrepreneur was unable to show convincing proof that his profits would have consisted of other than speculative returns.²

In still a third set of cases wholly speculative profits may be recovered if companies in which they are properly insured refuse to pay them. The right in England and the United States to insure expected, contingent or speculative profits has been settled by a long line of rulings which refer usually to losses at sea. This general expectation of profit is a definite entity, susceptible of possessing value and of being sold; it is sometimes insured entirely independent of the value of the cargo, but the latter must be known to determine the actual profits had the merchandise been sold.³ English courts usually require the owner of the cargo to show that a definite profit would have been realized from the adventure if the property had not been lost.⁴ He is not allowed to collect imaginary

¹ *United States v. Speed* (1868) 75 U. S. 77, at pp. 84-85.

² *Ibid.*, *United States v. Behan* (1884) 110 U. S. 338, at p. 345, 4 Sup. Ct. 81; see *Hinchley v. Pittsburg Steel Co.* (1887) 121 U. S. 264, at pp. 276-277, 7 Sup. Ct. 875; *Masterson v. Mayor etc. of Brooklyn* (N. Y. 1845) 7 Hill 74; *Philadelphia etc. R. R. v. Howard* (1851) 54 U. S. 307, at p. 344; *Fox v. Harding* (1851) 61 Mass. 516; *Hawley v. Corey* (1893) 9 Utah 175, 33 Pac. 695; *Dr. Harter etc. Co. v. Hopkins* (1892) 83 Wis. 309, 5 N. W. 501.

³ *Abbott v. Sebor* (N. Y. 1802) 3 Johns. Cas. *39; *Halhead v. Young* (1856) 6 El. & Bl. 312; *M'Swiney v. Royal Exchange Assurance* (1849) 14 Q. B. 634.

⁴ *Hodgson v. Glover* (1805) 6 East 316; *Lewis v. Rucker* (1761) 2 Burr. 1167; *Barclay v. Cousins* (1802) 2 East 544; *Eyre v. Glover* (1813) 16 East *218, at p. *220; *Grant v. Parkinson* (1781) 3 Dang. 16; see *Ionides v. Pender* (1872) 27 L. T. R. 244.

profits or insure the returns of a mere wager.¹ In the United States, on the other hand, the owner of the insured merchandise is not required to furnish this form of proof. In a New York case, Mr. Justice Livingston was positive that "it does not follow that a profit will be made if the cargo arrives: yet its loss would give a right to recover on such an insurance."² It has also been held by a court of the United States that the insured profits on a ship and cargo lost at sea were recoverable without showing that there would have been an ultimate profit if the loss had not occurred.³ Contrasted in other words, the English law does not allow the owner of a cargo to shift market risks upon the insurance company—the latter takes only the risks of the sea; but the law of our own states allows the underwriter to accept both hazards. Certain it is, that in either case a profit consisting entirely of an unearned value or a scarcity surplus may be reaped on such speculative ventures not unlike the gains of the stock market. That is to say, this form of profit is simply "the improved value of the cargo when it has been landed at its destined port;"⁴ and, as it may be fully insured against all perils of the sea,⁵ it is plain that the entrepreneur takes only market risks. Yet this form of insurance has been properly legalized by favorable decisions.⁶

It is clear from the preceding discussion that while American jurists have recognized a pure surplus-value income, they have not gone far from the idea that profit is a concrete product of land, labor or capital. For example, the land itself, its contents and the chattels upon it are still considered as profits in modern decisions. Moreover, the theory that the concrete return of the land in the form of soil, minerals, fish and game

¹ Stat. 19 Geo. II, c. 37.

² *Momford v. Hallett* (N. Y. 1806) 1 Johns. *433, at p. *438.

³ *Patapsco Insurance Co. v. Coulter* (1830) 28 U. S. *222.

⁴ *Halhead v. Young*, *supra*, footnote 3, p. 204, at p. 324.

⁵ *Royal Exchange Assurance v. M'Swiney* (1850). 14 Q. B. 646, at p. 660.

⁶ *Barclay v. Cousin*, *supra*, footnote 4, p. 204, at p. 548; *Craufurd v. Hunter* (1798) 8 Durn. & E. 13; *Lovatt v. Hamilton* (1839) 5 M. & W. *639; *King v. Glover* (1806) 2 Pos. & Pul. N. R. 206; *Flint v. Flemmyng* (1830) 1 B. & Ad. 45, at p. 48.

is a profit in kind is a doctrine not far different from the legal rent concept; for rent may likewise be paid in land, products or money. In these cases, rent rests, therefore, wholly upon a productivity concept of the profit from land; it still issues out of the land or is paid out of the profits from it. Also tenements, as distinguished from the stock or chattels on leased premises, are still attached to the land, and rent issues from them as a matter of course. From the stock, however, only profits and interest are obtained, yet as an exception to this rule the courts in Virginia and Pennsylvania have also attached the rent concept to such chattels. These productivity concepts are a direct inheritance from certain leading cases of the medieval period. Their importance to-day is doubtless largely due to the conservative character of the law. But in reviewing the complex and trying questions which appear before American courts, one is fully impressed by the constant use which is still made of these concepts and the apparent need for their retention.

However, there is a tendency in some states to unite rents, profits, and interest into one income. As a New York court concluded:

In fine, whatever this business continuously earned as rent or profits or interest or income or profit, is contemplated and described by the words "profits and gains" and "income" used by the testator, for rent is a profit, and profit is a gain; interest is a profit or income; income is a gain or a profit, and profit is a gain, and, generally, whatever is received for the hire or for the use of property is a gain.¹

In rendering this decision the court left out only the labor and risk concepts of profit—an exception which was probably due to the fact that they were not relevant to a decision of the issue. This excerpt is a timely illustration of the flexibility of the common law and of the use of terms, which preserve so effectively the original profit concepts of medieval decisions. Of course, no real harm is done in recognizing that profits are paid out of land, capital, products or money; but great danger does lie in attributing to these elements the primary cause of

¹ *Thorn v. De Breteuil*, *supra*, footnote 4, p. 194, at p. 417.

profits. By conceding to capital, labor, and land only their respective parts, we may more easily accomplish a much-needed analysis of the surplus increment which goes to the entrepreneur. But having discounted the effect of these factors upon production, the legalists are obviously puzzled over the exact nature of the surplus which remains after deducting interest and wages of management. This increment is being slowly analyzed and differentiated into its numerous elements; and only recently courts have realized its complex character.

Looking over the whole varied range of legal concepts of profit we may draw several pertinent conclusions:

First, although our courts have more or less discarded the labor concept of profit, except in suits for damages, there still remains sufficient legal authority for an efficiency theory of profits. That is, if we define efficiency profits as the gain arising from reduced costs of production, there are many decisions which in their general context would support this new concept of profit. As recent evolutions in industry have forced upon them new impressions of the magnitude of the residual surplus, less attention has been given to the labor and capital concepts of profit. In several decisions, indeed, it is denied that profits constitute a compensation for the use of capital; in other opinions it is likewise denied that profits form the real compensation of labor. That profits depend on the peculiar powers of both capital and labor, without being exactly a compensation for their services, is doubtless the view of many American judges. As we have observed, this surplus is commented upon in Bouvier's *Law Dictionary*. It is said there, in referring to the views of the classical economists, that gross profits equal the difference between the value of advances and the value of returns, that the net profit constitutes so much of this difference as may be due solely to the capital employed, and that "the remainder of the difference, or, in other words, the gross profits minus the net profits, has no particular name, but it represents the profits attributable to industry, skill and enterprise."¹ Again, in that branch of the law which controls the

¹ Bouvier, *loc. cit.*

use of patented inventions, courts are constantly separating the profits of efficiency from the speculative surplus. If one producer infringes upon the rights of another by unlawfully using simply a patented process in production, the patentee is able to recover only the profits of efficiency. These are determined according to the advantage which the former derives from using the patented device in comparison with any other known method which would have secured exactly the same result.

Second, although American jurists do not deliberately or consciously recognize that profits often originate wholly in the increased intensity of demand forces, the value concept of profit has acquired constantly increased importance. For example, courts have realized that in the returns from investments in wild or wholly unproductive land, the profit surpluses are largely speculative and of a much different character from the returns on capital employed in commerce and manufacturing. Again, we have already noted that the life tenant is entitled only to the actual income or earnings from an estate, while the surplus value increment arising from the natural enhancement of property is construed to be capital. The latter is therefore added to the estate. Finally, in the case of monopolies the value surplus is easily recognized. The sudden evolution of trade combinations has revealed many new schemes for controlling the market surplus. And the remarkable interpretations which have been drawn from the common law in detecting the monopoly increment have proved the ability of American judges in meeting a most serious problem of modern times. Here at least the courts have recognized that contracts in partial restraint of trade may permit a daily harvest of unearned surpluses.

Third, whether our courts give recognition to an efficiency or a value concept of profit, or to any other of the preceding theories of the entrepreneur's income, such returns may be expressed in terms either of value or of concrete goods. In other words, the legal concepts of profit include all forms of the final product and all concrete factors of production; its unusual scope makes possible, therefore, the most searching inquiry into the earned and unearned increments of the undertaker.

Fourth, these economic doctrines of the common law are

fully as substantial and persistent as other parts of its legal structure. Essentially vital to the present subject is the fact, that they will continue to affect legal reasoning, contractual rights, methods of wealth distribution, and indirectly the economic structure of the community. There is a constant readjustment between the legal and the social structure of economic society, and this change is reflected in legal-economic theory. In the English medieval law we have found the legal origin of a labor or cost profit which entered into the expenses of production; but in certain instances modern law has legalized both speculative and monopoly gains arising from the exploitation of market prices. What was bold robbery in medieval times may have become lawful service and legitimate production to-day. In the evolution from medieval to modern principles, the courts have found it unnecessary to draw a legal distinction between cost profits entering into the costs of production and speculative gains arising from an increased demand. However, in the adjustment of these economic concepts, it is likely that both jurists and statesmen will be forced ultimately to meet the vital legal-economic problem which lies in the separation of cost, speculative and monopoly profits.

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